Supreme Court, U. S.
F I L E D
JUL 12 1979
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-53

LOUIS ABRAHAM, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TOM L. ARMSTRONG, *Esq.*
WILLIAM K. POWERS, *Esq.*
DYER, POWERS, MARSH,
TURNER & ARMSTRONG
Suite 210, 525 S. Main
Tulsa, Oklahoma 74103
(918) 587-0141
Attorneys for Petitioner,
LOUIS ABRAHAM, JR.

July, 1979

MARVIN PRINTING CO., 405 S. DETROIT, TULSA, OK., PH. 584-7317

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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO._____

LOUIS ABRAHAM, JR.
Petitioner,

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

Petitioner, Louis Abraham, Jr., respectfully prays that this Court review the order entered by the Court of Appeals for the Tenth Circuit, dismissing Mr. Abraham's appeal. The appeal was from an order of the U. S. District Court for the Western District of Oklahoma which denied Petitioner's motion to dismiss an indictment which, on its face, attempts to prosecute and punish Petitioner twice for the same act in violation of the Double Jeopardy Clause of the Fifth Amendment. The Court of Appeals, in its order dismissing the appeal, ruled it had no jurisdiction to review the double jeopardy appeal because a jury had not yet been empanelled and sworn and, therefore, jeopardy had not formally "attached".

The dismissal below appears to conflict in principle with the rule announced in *Abney vs. United States*, 431 U.S. 651 (1977), and with the application of the rule or its underlying principles as applied in at least four other Circuit Courts. Resolution of the important jurisdictional and procedural issues raised by the Circuit Courts' interpretation of *Abney* will prevent transformation of the *Abney* rule into a case-by-case factual inquiry. It will also promote the uniform and efficient administration of federal criminal justice in the Federal Courts.

The importance of the question presented and the need for resolution on review is also demonstrated by the fact that the Court of Appeals has stayed its mandate pending final disposition of the instant petition for certiorari. (App. A-1).

OPINION BELOW

The opinion of the Court of Appeals, the Court's order on rehearing, and the order of the District Court for the Western District of Oklahoma, appear as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1979. A timely petition for rehearing was granted to the extent of amending the form of the judgment, and otherwise denied, on June 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTION PRESENTED

Under the principle announced in *Abney vs. United* States, 431 U. S. 651 (1977,) must Petitioner delay filing a motion to dismiss on double jeopardy grounds until the

jury is formally empanelled and sworn in order for the issue to be ripe for review on appeal, where the vice of double jeopardy is apparent on the face of the indictment?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "Nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; . . ."

28 U.S.C. §1291 provides in pertinent part:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . .".

Federal Rules of Criminal Procedure, 12(b) and 12 (f) provide in pertinent part:

> "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial on motion . . . The following must be raised prior to trial: . . . (2) defenses or objections based on defects in the indictment . . .;
>
> ". . . Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, . . ."

Federal Rules of Appellate Procedure 4(b) provides in pertinent part:

> "In a criminal case the notice of appeal by a defendant shall be filed in the District Court within ten days after the entry of the judgment of order appealed from."

STATEMENT OF THE CASE

On December 7, 1978, a Grand Jury empanelled within the Western District of Oklahoma returned an indictment charging a conspiracy to violate §1 of the Sherman Act, 15 U.S.C. §1, against four defendants: Jarboe Sales Company, a small three-man partnership in which Louis Abraham, Jr., is a partner, and Louis Abraham, Jr., individually; Central Liquor Company, a two-brother partnership in which Robert Z. Naifeh is a partner, and Robert Z. Naifeh, individually.

On December 27, 1978, motions to dismiss on double jeopardy grounds were timely filed by Mr. Abraham and Mr. Naifeh. The indictment shows, on its face, that the government is attempting to prosecute, try and punish both Mr. Abraham and his partnership *for the same Sherman Act violation.*

The District Court heard all pre-trial motions on January 4, 1979. At that time, the Court overruled Mr. Abraham's motion to dismiss the indictment on double jeopardy grounds. Before doing so, however, the Honorable District Judge observed that, if it were not for the authority of *Western Laundry and Linen Rental Co. vs. United States,* 424 F.2d 441 (9th Cir., 1970) *cert. denied,* 400 U. S. 849, counsel for the defense would "have no difficulty proving or persuading me that we have double jeopardy here . . . ". (Tr. p. 19 - 20).

The District Court noted in its order overruling the motion to dismiss that the ruling on the double jeopardy question was a final order and was immediately appealable to the Court of Appeals. (App. A-5.) At no time during the proceedings in the District Court did the government question Judge Eubanks' ruling that, under this Court's decision in *Abney v. United States, supra,* his denial of the

motion to dismiss on double jeopardy grounds was an immediately appealable final order.

Petitioner filed a timely appeal to the Court of Appeals. The double jeopardy question was elaborately briefed on the merits by both sides. In its brief on appeal, however, the government, *for the first time,* suggested that there was a question as to the appealability of the District Court's order. The government argued that the appeal was not within the scope of the principle announced by *Abney, supra,* since the double jeopardy claim being asserted by Petitioner appeared to be directed primarily to the question of multiple punishment and simultaneous trials, rather than sequential trials.

The government's theory was vigorously disputed in Petitioner's reply brief in the Court of Appeals. Nor was the government's position adopted by the Court of Appeals in its opinion. Instead, the decision of the Court of Appeals, dismissing the appeal, was based upon an issue which was neither raised nor briefed by Petitioner or the government. The Circuit Court, *sua sponte,* noted that jeopardy had not formally "attached", since a jury had not been empanelled and sworn, and therefore the appeal was premature. The Court of Appeals relied upon *Serfass v. United States,* 420 U.S. 377 (1975) in so holding. In *Serfass,* the question was whether jeopardy had sufficiently "attached" so as to preclude an appeal *by the government* under 18 U.S.C. §3731. The Circuit Court held that the *Serfass* limitation was implicit in the facts of *Abney, supra,* even if not within the language of the Abney opinion.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court appears to conflict in principle with the decision of this Court in *Abney vs.*

United States, 431 U. S. 651 (1977), as well as to conflict with the application of the *Abney* principle as applied in other Circuit Courts.

2. Resolution of the important jurisdiction and procedural question is immediately necessary for the uniform and efficient administration of federal criminal justice.

DISCUSSION

This Court, in *Abney v. United States*, 431 U.S. 651 (1977), announced the rule that a decision of a District Court denying a motion to dismiss on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. §1291, which is immediately appealable. The major factors which supported the principle announced in *Abney* were expressed to be:

> (1) Such orders constitute a complete, formal and in the Trial Court, a final rejection of a criminal defendant's double jeopardy claim;
>
> (2) The very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged;
>
> (3) The rights conferred on a criminal accused by the double jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.

Those same factors have been held by this Court to support jurisdiction under 28 U.S.C. §1291 in several contexts. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Eisen v. Carlisle and Jacquelin*, 417 U. S. 156 (1974). The "finality" requirement has repeatedly been held by this Court to be given a practical, rather than technical, con-

struction. *Eisen v. Carlisle and Jacquelin, supra; Cohen v. Beneficial Industrial Loan Corp., supra.*

> "... and our cases long have recognized that whether a ruling is 'final' within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction' ". (Citations omitted.) *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152 (1964).

The effect of the Court of Appeals' decision below would be to make the rule announced in *Abney, supra*, dependent upon the facts giving rise to the double jeopardy issue. Such a holding leaves the federal bench and the bar adrift with respect to when an appeal in double jeopardy cases may be taken. A rule, such as the one announced in *Abney, must* be drawn in terms of categories, rather than factual circumstances, for the guidance of the bar and bench.

> "Appeal rights cannot depend upon the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957).
>
> "(c)larity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *Serfass v. United States*, 420 U.S. 377, 384 (1975), *quoting United States v. Sisson*, 399 U.S. 267, 307 (1970).

The principle announced in *Abney* has been properly understood by scholarly commentators on federal juris-

diction. *See*, 15 Wright and Miller, *Federal Practice and Procedure*, §3918 (1978 Supp.):

> "The *Abney* decision is written in terms that appear to cover *all* motions to dismiss on double jeopardy grounds . . . (because) immediate appeal provides the only effective protection of the important purpose of the double jeopardy guaranty to insulate not only against conviction, but also against the personal strain, public embarrassment and expense of an *improper* criminal trial." (emphasis added).

The importance of clarity and the federal bar's need for guidance on the precise issue involved in this case cannot be overstated. The government's brief filed in the Court of Appeals below noted that there are approximately 1,062,000 partnerships in the United States having gross annual receipts of one hundred thirty-nine billion dollars (pg. 8, government's brief in chief in the Circuit Court below). The question whether prosecution and punishment of a partner and his partnership for the same act under the Sherman Anti-Trust Act violates the Double Jeopardy Clause has yet to be determined on the merits. Certainly, future attempts by the government to prosecute a partner and his partnership will raise the precise double jeopardy issue in question here.

As indicated above in the "Statement Of The Case", Judge Eubanks believed his order overruling Petitioner's motion to dismiss on double jeopardy grounds to be immediately appealable. At no time during the pre-trial proceedings at the trial court level did the government ever question the appealability of the order. On appeal to the Circuit Court, the government did argue for the first time that Petitioner should not be allowed to appeal the double jeopardy question. The government's argument was based upon its assertion that, a double jeopardy plea, if good, can always

be the basis for an appeal in the event of an unfavorable verdict and could become moot in the event of a favorable verdict. That argument was rejected in *Abney*, *supra*, and was not adopted by the Court below as grounds for its dismissal of the appeal. Instead, the Court of Appeals, *sua sponte*, grounded its dismissal on the rule announced by this Court in *Serfass v. United States*, 420 U.S. 377 (1975). In *Serfass*, the question was whether jeopardy had sufficiently "attached" so as to prohibit an appeal by the government under 18 U.S.C. §3731. Cases involving the government's right to appeal under 18 U.S.C. §3731 has absolutely *no relevance* to the issues in this case. §3731 relates to the *government's* right to appeal in a criminal case. In *Carroll v. United States*, 354 U.S. 394 (1957), this Court considered the question whether the government could appeal an order granting motions to suppress. This Court noted that appeals by the government in criminal cases are something "unusual exceptional, not favored" (pg. 400). This Honorable Court then noted that the question of appealability under 28 U.S.C. §1291 is independent from and not limited by the provisions of 18 U.S.C. §3731:

> "It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. §1291, 28 U.S.C.A. §1291, *without regard to the limitations of* 18 *U.S.C.* §3731, 18 U.S.C.A. §3731, . . ." *Carroll v. United States*, *supra*, pg. 403 (emphasis added).

Simply §3731, *supra*, was an attempt to make the government's right to appeal co-extensive with its ability to re-try the defendant if its argument on the merits should fail on review. Even under §3731, the Courts of Appeal have the right to review issues concerning the prohibitions of the

double jeopardy clause itself. *United States v. Castellanos*, 478 F. 2d 749 (2nd Cir. 1973).

Moreover, the decision of the Court below is not in accord with reported decisions in the other Circuit Courts of Appeal. In *United States v. Garcia*, 589 F.2nd 349 (5th Cir. 1979), the 5th Circuit held that the trial court's order denying defendant's motion to dismiss the indictment on the grounds the indictment itself constituted double jeopardy was an appealable order. (Even though the Circuit Court flatly stated that it determined on the merits that jeopardy had not yet "attached" sufficiently to bar the government from proceeding to trial.)

In *Launius vs. United States*, 575 F.2d 770, (1978), the Circuit Court held that there is no Constitutional distinction between sequential jeopardy and simultaneous jeopardy (holding that where the information was multiplicious, consecutive sentences violated the double jeopardy clause).

In *United States v. Alessi*, 536 F.2d 978 (2nd Cir., 1976) the Court was faced with the issue whether prosecution of the defendant for tax evasion was barred by terms of a prior plea bargain pursuant to which the defendant had pleaded guilty to a narcotics conspiracy. Even though the case involved a plea bargain *and no jury had ever been empanelled and sworn*, the Circuit Court held that the order overruling defendant's motion to dismiss on double jeopardy grounds was appealable. Referring to an earlier 2nd Circuit decision, *United States v. Beckerman*, 516 F.2d 905 (2nd Cir., 1975) the Court held:

> "The government argues that *Beckerman* should be restricted to those situations where the defendant has already undergone the trauma of a first trial and should be inapplicable where, as here, Alessi pleaded guilty to the earlier indictment. ***Even were we to accept the debatable proposition that there is less stress involved in pleading guilty than in standing trial, we fail to see how the distinction bears any relevance to the purposes of the double jeopardy clause, as outlined above.***" *Alessi, supra*, p. 980 (emphasis added).

In *United States v. MacDonald*, 531 F.2d 196 (4th Cir., 1976), reversed on other grounds, 435 U.S. 850 (1978), the Circuit Court held that the denial of a plea of double jeopardy is a proper subject for review under 28 U.S.C. §1291, even though the defendant had never previously been indicted, much less forced to stand before a jury "empanelled and sworn". In that case, the defendant had been charged by the Army on May 1, 1970, with the murder of his wife and the couple's two daughters. After an Article 32 hearing, the charges were dismissed and he was never brought to trial by the military authorities. Following his discharge, the CID and the Justice Department continued the investigation of the case. MacDonald (now a civilian), was ultimately indicted by a Grand Jury on January 24, 1975. Although the Court of Appeals did not decide the merits of MacDonald's double jeopardy plea (it instead rested its decision on the Sixth Amendment provision for a speedy trial which decision was subsequently reversed by this Court), it did hold that "the denial of MacDonald's plea of double jeopardy, - - - is a proper subject for interlocutory review" under 28 U.S.C. §1291. (pg. 199).

Finally, the decision of the Court below could well create a procedural "morass" which would trap the alert as well as the unwary counsel. Under Rule 4(b) of the Federal Rules of Appellate Procedure, in criminal cases a notice of appeal *must* be filed within ten (10) days from the date of the judgment or order appealed from. Such requirement has been held "mandatory and jurisdictional",

United States v. Robinson, 361 U.S. 220 (1960). On the other hand, under Rule 12, Federal Rules of Criminal Procedure, a double jeopardy claim may well be waived if not presented prior to trial.

Even if a defendant has not "waived" his right to complain of double jeopardy by waiting until after a jury is "formally empanelled and sworn", the effect of the Court of Appeals' holding will still be disruptive. Counsel for Mr. Abraham is under a professional obligation to raise the double jeopardy issue the instant it becomes "ripe" for adjudication. Under the Court of Appeals' holding, counsel would, therefore, be required to wait with motion to dismiss on double jeopardy grounds in hand to be filed the instant a jury became empanelled and sworn. Such a course would totally disrupt a trial with a jury already empanelled. Such procedure would require the useless empanelling of a jury as a mere formality to trigger the renewal of Mr. Abraham's motion to dismiss on double jeopardy grounds, and an immediate appeal under the rule announced in *Abney, supra*, in the event the motion is denied.

We are confident the Court of Appeals had no intention of creating such a procedural quagmire for defendants and their counsel. We respectfully submit that the proper resolution of this dilemma is for this Court to remand the case to the Court of Appeals for a hearing on the merits of the double jeopardy claim.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TOM L. ARMSTRONG
WILLIAM K. POWERS
Dyer, Powers, Marsh, Turner & Armstrong
525 South Main, Suite 210
Tulsa, Oklahoma 74103
Telephone: (918) 587-0141
Attorneys for Petitioner
LOUIS ABRAHAM, JR.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed three (3) copies of the foregoing Petition for a Writ of Certiorari in conformity with Rule 33 of the Supreme Court Rules to:

Wade H. McCree, Solicitor General
Office of the Solicitor General
U. S. Department of Justice
Washington, D.C.

this 12th day of July, 1979, with postage fully prepaid thereon.

.....

TOM L. ARMSTRONG

APPENDIX A

Opinion of the Court of Appeals for the Tenth Circuit;

Order of the Court of Appeals on Rehearing;

Order of the District Court for the Western District of Oklahoma Overuling Motion to Dismiss on Double Jeopardy Grounds.

5-15-79 79-1017 — 79-1018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

APPENDIX A

MAY TERM — JUNE 15, 1979

Before the Honorable Oliver Seth, Chief Judge, The Honorable Howard T. Markey, Chief Judge, U. S. Court of Customs and Patent Appeals*, and The Honorable William J. Holloway, Jr., Circuit Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LOUIS ABRAHAM, JR., and
ROBERT Z. NAIFEH,
Defendant-Appellants

No. 79-1017
79-1018

This matter comes on for consideration of appellants' petition for rehearing in the captioned cases, or in the alternative, for clarification of the judgment, and for stay of mandate pending certiorari.

Upon consideration whereof, the Court orders:

1. The judgments of this Court in the captioned cases are amended to state "The appeal is dismissed."

2. The petition for rehearing is otherwise denied.

3. The mandates in these cases are stayed to and including July 15, 1979 pending timely filing of petitions for writ of certiorari. If on or before that date there is filed with the Clerk of the Court of Appeals, a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, *Clerk*
By: Robert L. Hoecker, *Chief Deputy Clerk*

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*Sitting by Designation.

Not For Routine Publication

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1017, 79-1018

UNITED STATES OF AMERICA,
Appellee,

v.

LOUIS ABRAHAM, JR. and
ROBERT Z. NAIFEH,
Appellants.

Appeal From The
United States District Court
For The Western District of Oklahoma
(D. C. #CR-78-00215-E)

Tom L. Armstrong, of Dyer, Powers, Marsh, Turner & Armstrong, Tulsa, Oklahoma, for Appellant, Louis Abraham, Jr.

B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (James P. Linn, Oklahoma City, Oklahoma, and Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, of Counsel, with him on the Brief), for Appellant, Robert Z. Naifeh.

Peter L. de la Cruz, Attorney, Department of Justice, Washington, D.C. (John H. Shenefield, Assistant Attorney General, Barry Grossman, Attorney, Department of Justice, Washington, D.C., and Barry F. McNeil and J. Michael Weston, Attorneys, Department of Justice, Dallas, Texas, with him on the Brief), for Appellee.

Before SETH, Chief Judge, MARKEY* and HOLLOWAY, Circuit Judge.

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

PER CURIAM.

These appeals present double jeopardy questions which are not ripe for review. On December 7, 1978, the grand jury empaneled within the Western District of Oklahoma handed down a one-count indictment which charged the appellants and their respective partnerships with criminal violations of section 1 of the Sherman Act, 15 U.S.C. §1.

The individuals, who are the appellants here, filed motions to dismiss the indictments on double jeopardy grounds. In these motions to dismiss and on appeal, appellants argue that if both the partner and his partnership were convicted, the partner would be subject to double punishment in that the partner would have to pay his personal fine as well as all or a share of the fine assessed against his partnership. The district court denied appellants' motions to dismiss, and they bring these appeals.

The Government contends that the district court's order overruling a motion to dismiss on double jeopardy grounds was proper as the defendant has not been put on trial for the first time. It seems apparent that to support a double jeopardy challenge, jeopardy must have attached at some stage of the proceedings. *Illinois v. Somerville*, 410 U.S. 458; *United States v. Rich*, 589 F.2d 1025 (10th Cir.); *see Collins v. Loisel*, 262 U.S. 426, 429. The Supreme Court in *Serfass v. United States*, 420 U.S. 377, stated:

> "The Court has consistently adhered to the view that jeopardy does not attach, *and the constitutional prohibition can have no application*, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.' " 420 U.S. at 388 (emphasis added).

Since the defendant must first be put in jeopardy before a claim can be made that the double jeopardy clause is violated, these appellants, who have yet to be put in jeopardy for the first time, cannot advance a double jeopardy challenge.

The appellants rely on certain language in *Abney v.*

United States, 431 U. S. 651, as support for their contention that this court must decide these double jeopardy questions. They correctly point out the issue addressed by the Supreme Court:

> "We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." 431 U.S. at 653.

They argue that since the Supreme Court did not recite that the defendant must first be put in jeopardy for such an appeal, the contention that jeopardy must attach before double jeopardy may be challenged on appeal is incorrect.

It is apparent that the Court in *Abney* was confronted by a case where the defendant had already been put on trial and was appealing prior to a subsequent prosecution for the same indictment. The Court in *Abney* expressly held that the threat of a *subsequent* trial was so severe that a defendant may appeal a double jeopardy challenge prior to that second trial. 431 U.S. at 660-62. *See National Broadcasting Co. v. Niemi,* 434 U.S. 1354, 1355.

We affirm the district court's overruling of the appellant's motions to dismiss the indictment.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

v.

CENTRAL LIQUOR COMPANY; JARBOE SALES COMPANY; LOUIS ABRAHAM, JR.; and ROBERT Z. NAIFEH,
Defendants.

No. CR-78-00215E

ORDER OVERRULING MOTION TO DISMISS INDICTMENT ON FIFTH AMENDMENT GROUNDS

The individual Defendants herein, Robert Z. Naifeh and Louis Abraham, Jr., have each filed a Motion to Dismiss the instant indictment as to each of them as individuals. The asserted ground for said Motion to Dismiss is that the indictment of both a partner in a partnership, and the partnership, for the same offense places the partner in double jeopardy and in jeopardy of double punishment in violation of the Fifth Amendment to the Constitution of the United States.

The Government had filed a responsive brief in opposition to each of the Motions to Dismiss of the individual Defendants.

The Court has heard oral argument upon the Defendants' Motions and the Government's response thereto.

Based upon the Court's understanding of the holding of *United States v. A & P Trucking Co.,* 358 U.S. 121, 79 S. Ct. 203, 3 L.Ed. 2d 165 (1968), as interpreted by the prevailing opinion of the Court of Appeals in *Western Laundry and Linen Rental Co. v. United States,* 424 F. 2d 441 (9th Cir. 1970,) cert. denied, 400 U.S. 849, the Court holds that the Motions to Dismiss on double jeopardy grounds filed

by the Defendants Naifeh and Abraham must be overruled. While it appears that Defendants' arguments in favor of dismissal are supported by the specially concurring opinion of Judge Hufstedler in the *Western Laundry and Linen Rental Co.* case, the Court feels bound to follow the interpretation contained in the majority opinion of Judge Madden in said case.

The Court recognizes that under the decision of the Supreme Court in *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed. 2d 651 (1977) and the Court of Appeals for the Tenth Circuit in *United States v. Martinez,* 562 F.2d 633 (10th Cir. 1977), this Order is a final decision within the meaning of 28 U.S.C. §1291 and therefore, appealable to the Court of Appeals for the Tenth Circuit.

LUTHER B. EUBANKS
United States District Judge

see

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